ESHWARA ENGINEERING SDN BHD

v.

DELTA STRUCTURE SDN BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF JC
[CIVIL SUIT NO: 22-152-2002]
18 JULY 2003

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Triable issues raised - Whether harm would result if injunction granted - Whether prejudicial to defendant - Whether court precluded from granting interlocutory injunction which gave applicant full relief sought*

The plaintiff supplied scaffolding materials and manpower to do necessary works at a power plant in a contract awarded by the defendant. The plaintiff alleged that up to 1 July 2002, the defendant was indebted to them for a sum of RM238,859 ('the said sum'). Subsequently, the plaintiff wrote to the defendant demanding for payment of the same and concurrently gave notice of their intention to terminate the contract and to commence legal proceedings for the recovery of the said sum. The plaintiff then terminated the contract and filed a suit against the defendant for recovery of the said sum and at the same time filed this application to restrain the defendant from preventing them to remove the scaffolding materials which are still left at the defendant's worksite. The plaintiff had also, in their affidavit, given undertaking as to damages in respect of this application for this injunctive relief.

The defendant denied that they were in breach of the contract and claimed they were not liable to pay the plaintiff on the grounds that the invoices submitted by the plaintiff were not signed by an architect or properly chopped, and were thus invalid. The defendant opposed this application and contended that there were a number of issues to be tried. Further, the defendant argued that this application would prejudice them because it would determine a substantial part or the whole of the plaintiff's action against them.

Held:

[1] An injunction is an order of the court forbidding the initiation or the continuance of some act or state of affairs or commanding that an act be done. The injunction sought by the plaintiff in this case to prevent the defendant from interfering with and preventing them from removing the scaffolding materials from the defendant's worksite is prohibitory in nature. (p 451 b-e)

[2] As disclosed from the affidavits, the plaintiff alleged a breach of contract on the part of the defendant and the defendant in reply had raised the issue of the validity of the invoices. Thus, there were serious issues to be tried. However, the court was not justified in embarking upon anything resembling the trial of the action upon the conflicting affidavits nor to evaluate the strength of the party's case. This court must consider the harm that the injunction would produce by its grant against the harm that would result from its refusal. (p 453 d-h)

[3] The defendant did not deny that other contractors working for the defendant were using the scaffolding materials. In reply to the defendant's statement that the plaintiff had failed to prove those materials belonged to them, the plaintiff showed proof through some photographs that the materials belonging to the plaintiff are colour coded with red and blue colour. Hence, it would cause a lot of hardship to the plaintiff in being deprived of the possession and enjoyment of their property and it would be a travesty of justice to deny them of their right to their property. (p 454 b-d)

[4] The plaintiff would suffer greater injustice if the relief they are seeking for is denied. There would be no injustice suffered by the defendant if the interlocutory injunction is granted. The contract between the plaintiff and the defendant has been terminated. The scaffolding materials rightly belonged to the plaintiff and it is certainly most inequitable to allow the defendant and/or his contractors to use those materials under the circumstances. (p 455 a-c)

[5] The court was satisfied with the plaintiff's ability to meet the undertaking as to damages in respect of this application should their suit against the defendant fail. Even if it was wrong to consider the issue of the undertaking, upon the case of *Petronas Dagangan Sdn Bhd v. Omar Abdul Samad*, an undertaking as to damages would only apply in an *ex parte*

application for an interim injunction and there is no such requirement for the same in an *inter partes* application such as this present case. Where the injustice to the plaintiff is so manifest, the judge would be entitled to dispense with the usual undertaking as to damages. Considering the circumstances of the case, the remedy the plaintiff was seeking for deserved favourable considerations and the scale of justice is tilted towards the plaintiff. (p 455 d-f)

[6] The defendant's argument that the grant of injunction in this case would either substantially or practically dispose of the subject matter before the court is untenable. The court is not precluded from granting an interlocutory injunction which gave the applicant the full relief actually sought to be secured at the final hearing where the matter is viewed on a balance of convenience. (p 456 a-b)

[Plaintiff's application allowed.]

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd [1995] 1 CLJ 461 SC ***(refd)***

American Cynamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Cheng Hong Guan v. Perumahan Farlim (Penang) Sdn Bhd [1988] 3 MLJ 90 ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] CLJ 185; [1982] CLJ (Rep) 99 FC ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Mbf Holdings Bhd v. East Asiatic Co (Malaysia) Bhd [1995] 4 CLJ 73 HC ***(refd)***

Malaysia Invertec Sdn Bhd v. Chan Mun Hong [1999] 5 CLJ 521 HC ***(refd)***

Mohamad Zainuddin v. Yap Chai Seng [1978] 1 MLJ 40 ***(refd)***

Petronas Dagangan Sdn Bhd v. Omar Abdul Samad [1996] 4 MLJ 391 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218

For the plaintiff - En Ganesh; M/s Ganesalingam Viyayaratnam & Co
For the defendant - Suhaimi Ahmad; M/s Chung, Chan & Hasnal

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof JC:

This is an application by the plaintiff for the following reliefs:

(a) Satu perintah injuksi supaya defendan dihalang sama ada dengan sendirinya atau ejennya daripada menghalang plaintif dan/atau ejen mereka dalam apa cara sekalipun daripada mengeluarkan bahan perencah yang dipunyai oleh plaintif daripada tapak projek pembinaan stesen janakuasa di Telok Penchalang, Lekir, Manjung, Perak Darul Ridzuan.

(b) Kos permohonan ditanggung oleh defendan.

(c) Apa-apa relif lain yang difikirkan adil dan/atau suaimanfaat oleh mahkamah yang mulia ini.

By a letter dated 29 November 2001 (exh. P1 in encl. 3) the defendant awarded to the plaintiff a contract for scaffolding works at the coal fired power plant in Manjung Perak. The works awarded to the plaintiff is inclusive of both the supply of scaffolding materials and manpower to do the necessary works. Among the contents of the said letter is that mobilization of equipment and workers was to commence on 1 December 2001 and that payment shall be made 30 days upon submission of valid invoice. The same letter also states the costing for the rental of the material and the manpower. In the affidavit in support of this application the plaintiff's director averred that up to 1 July 2002 the defendant is indebted to the plaintiff for a sum of RM238,859 for work done and by a letter dated 7 June 2002 exhibited as P3 in encl. 3 the plaintiff wrote to the defendant demanding for the payment of the same and at the same time giving notice to the defendant of their intention to terminate the contract and to commence legal proceedings for the recovery of the said sum. The contract was subsequently terminated by the plaintiff when another letter dated 28 June 2002 was sent to the defendant *via* exh. P4 in encl. 3. The plaintiff then filed a suit against the defendant for the recovery of RM238,859 and at the same time filed this application to restrain the defendant from preventing them to remove the scaffolding materials which are still left at the defendant's worksite and being used by other contractors. The plaintiff has also in their affidavit given an undertaking as to damages in respect of this application for this injunctive relief.

The defendant denies that they are in breach of the contract and claim that they are not liable to pay the plaintiff on the grounds that the invoices submitted by the plaintiff are not valid in that they are not signed by an architect and not properly chopped. It is to be noted that the invoices and the progress certificate submitted by the plaintiff to the defendant were all affirmed by the defendant's project manager. The defendant has filed altogether three affidavits in opposition of the application which go basically to show to this court that there are a number of issues to be tried by this court in respect of the claim

by the plaintiff, and that they also have a counterclaim against the plaintiff. The defendant further contends that they would be prejudiced by this application in that this application will determine a substantial part or the whole of the plaintiff's action against them.

The injunction sought by the plaintiff in this case to prevent the defendant from interfering with and preventing them from removing the scaffolding materials from the defendant's worksite is prohibitory in nature as opposed to what the learned counsel for the defendant submitted before this court. An injunction is an order of the court forbidding the initiation or the continuance of some act or state of affairs or commanding that an act be done. It is a preventive and protective remedy aimed at future acts forbidding the defendant from doing some acts which he is threatening or attempting to commit or restraining the continuance thereof. An injunction which forbids doing or going on doing an act, is prohibitory. An order which directs the defendant to do something to repair an omission or to restore the prior position by undoing a wrongful act such as building in breach of a respective covenant, is a mandatory injunction. (See: L A Sheridan, *Injunctions in General* (1994 Ed.) Barry Rose, Law Publisher Ltd quoted by KC Vohrah J in *Mbf Holdings Bhd v. East Asiatic Co. (Malaysia) Bhd* [1995] 4 CLJ 73. Earlier, in the course of the hearing, parties were at variance as to the nature of the injunctive relief sought for, and having heard the submissions from both counsels and on the facts established, I rule that the injunction sought for by the plaintiff to restrain the defendant from so interfering and preventing the plaintiff from removing the scaffolding materials from the defendant's worksite is prohibitory in nature.

In arriving at the conclusion as to whether an interlocutory injunctive relief should be granted or refused, I would firstly adopt the approach as stated by Hashim Yeop Sani J (as he then was) in *Mohamad Zainuddin v. Yap Chai Seng* [1978] 1 MLJ 40, where at p. 42 his Lordship had this to say:

> Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are svenly balanced it may not be improper for the court to take into account any topping in the balance as revealed by affidavits ... . Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balance the court should grant an interlocutory injunction which would maintain the *status quo.* It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.

The above passage was cited with approval by the Court of Appeal in the case of *Keet Gerald Francis Noel John v. Mohd. Noor @ Harun b. Abdullah & 2 Ors.* [1995] 1 CLJ 293 which has further elaborated the approach that ought to be taken by a judge hearing an application for interlocutory injunction. It will be useful at this stage that I quote the relevant part of the judgment by Gopal Sri Ram JCA at p. 305 where His Lordship had this to say:

> A judge hearing an application for interlocutory injunction should undertake an inquiry along the following lines:
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> First, he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issues to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant materials before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;
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> Second, having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the Judge would be entitled to dispense with the usual undertaking as to damages (see: *Cheng Hang Guan v. Perumahan Farlim (Penang) Sdn. Bhd.* [1988] 3 MLJ 90). Apart from such cases, the Judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee;

> Thirdly, the Judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] AC 130 and applied in *Cheng Hang Guan (supra)*. It is a judicial discretion capable of correction on appeal. Accordingly, the Judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A Judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

For the purpose of this application, no less than six affidavits has been filed by the parties and having perused those documents I have come to the conclusion that there certainly exists *bona fide* issues to be tried in the matter. As disclosed from the affidavits, the plaintiff alleges a breach of contract on the part of the defendant and the defendant in reply has raised the issue of the validity of the invoices and contending the terms of the contract as being so simplistic and vague. Not only the defendant disputes the plaintiff's claim, they also have stated in the affidavits in reply that the matter ought to be tried and determined on the merits of the claim which points to the fact that there exists serious issues to be tried in the subject matter. My perusal of encls. 8, 11 and 12 of the defendant's affidavits in reply clearly indicate the existence of several triable issues before this court. Of course this court is not justified in embarking upon anything resembling the trial of the action upon the conflicting affidavits nor to evaluate the strength of the party's case, for as stated by Lord Diplock in *American Cynamid Co. v. Ethicon Ltd.* [1975] AC 396 at p. 407:

> ... It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed arguments and mature considerations.

Having found that there are serious issues to be tried in the matter, the court must further consider the justice of the matter before it. In so considering, this court has to consider the harm that the injunction would produce by its grant against the harm that would result from its refusal. Here we have a plaintiff who has supplied scaffolding materials and workers, who has not been paid for the materials supplied and work done and who is also deprived of the possession and usage of those materials after the termination of the contract.

The plaintiff has now come knocking at the door of this court seeking for justice in the form of damages as well as the injunctive relief. Being deprived of the possession and use of the scaffolding materials which are still left at the defendant's worksite would mean financial losses to the plaintiff and at the same time, as stated in the plaintiff's affidavit contending the defendant should not be allowed to take advantage of the situation by continuing to use those materials despite the termination of the contract with the plaintiff. The plaintiff has averred in their affidavit that other contractors working for the defendant are using the scaffolding materials and this has never been denied by the defendant except by stating that part of the scaffolding materials belong to them and that the plaintiff has failed to prove that those materials belong to them. In reply to this, the plaintiff has filed a further affidavit in encl. 10 showing proof through some photographs that the materials belonging to the plaintiff are colour coded with red and blue colour. In my view, whatever dispute that may arise between the two parties regarding the payment for the said contract, it would cause a lot of hardship to the plaintiff in being deprived of the possession and enjoyment of their property and it would be a travesty of justice to deny them of their right to their property. In this respect, I am very much indebted to Abdolcader J (as he then was) who in *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ 185; ([1982] CLJ (Rep) 99) at p. 186 (p. 100) said:

> In deciding the manner of interlocutory injunction that should be granted courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction *(Bonner v. Gret Western Railway Company (supra))*. Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v. Pearson* [1880] 15 Ch. D. 113, (at p. 117).

Weighing these factors, I am of the view that the plaintiff will suffer greater injustice if the relief they are seeking for is denied. In my view the injustice caused to the plaintiff if this remedy is withheld is manifest and equity is on the side of the plaintiff. In so far as the defendant is concerned, I am satisfied there would be absolutely no injustice suffered if the interlocutory injunction is granted. The contract between the plaintiff and the defendant has been terminated. The scaffolding materials rightly belong to the plaintiff and it is certainly most inequitable to allow the defendant and/or his other contractors to use those materials under the circumstances. The grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever course that appears to carry the lower risk of injustice. (See: *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd* [1995] 1 CLJ 461)

As to the undertaking given by the plaintiff in respect of damages, I am satisfied of the plaintiff's ability to meet that undertaking should their suit against the defendant fail. I have also taken into consideration that the plaintiff has obtained a judgment against the defendant in respect of another suit and that an action under s. 218 of the Companies Act 1965 has been initiated against the defendant in the Seremban High Court which was unsuccessfully restrained by the defendant. Be that as it may, even if I am wrong in considering the issue of this undertaking, I find comfort in relying upon the judgment of my learned brother judge Abdul Malik Ishak in the case of *Petronas Dagangan Sdn Bhd v. Omar b. Abdul Samad* [1996] 4 MLJ 391 in holding that an undertaking as to damages would only apply in an *ex parte* application for an interim injunction and there is no such requirement for the same in an *inter partes* application such as the one before me now. I respectfully adopt the views of the learned judge in the said case. Again as stated by His Lordship Gopal Sri Ram JCA in *Keet Gerald*'s case, where the injustice to the plaintiff is so manifest, the judge would be entitled to dispense with the usual undertaking as to damages (See: *Cheng Hong Guan v. Perumahan Farlim (Penang) Sdn Bhd* [1988] 3 MLJ 90).

The remedy of injunction is a form of equitable relief and the courts has always held that the remedy is discretionary in nature. The maxim that goes to say that he who comes to equity must come with clean hands must be applicable to the plaintiff in the instant case. Considering the circumstances of the case and the conduct of the plaintiff, this court is of the considered view that the conduct of the plaintiff bespeak of a prudent man and from the disclosure of facts presented before the court, it calls for no further comment than to say that the remedy that the plaintiff is seeking for deserves favorable considerations and that the scale of justice is tilted towards the plaintiff.

It was submitted by learned counsel for the defendant that the grant of injunction in the instant case would either substantially or practically dispose of the subject matter before this court, and that would be prejudicial to the defendant. In his submissions, the learned counsel argues that the facts disclosed in the affidavits demand the full adjudication of the matter and that the whole issue ought to be decided on its merits during a full trial. An answer to this argument is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing where the matter is viewed on a balance of convenience (*Malaysian Invertec Sdn Bhd v. Chan Mun Hong* [1999] 5 CLJ 521.)

For all the above reasons, I find that the justice of this case requires the grant of the plaintiff's application for the injunctive relief and I accordingly allow the plaintiff's application in terms.